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13
14 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

15 APPLICATIONS IN INTERNET TIME, LLC,
16

17 Plaintiff,

18 v.
19

SALESFORCE.COM, INC.,
20

21 Defendant.

No. 3:13-CV-00628-RCJ-VPC

SALESFORCE'S OPPOSITION TO
AIT'S MOTION TO COMPEL
DISCOVERY

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1 **I. INTRODUCTION**

2 AIT’s motion to compel should be denied. First, at this late date—just prior to the close of
 3 fact discovery—AIT seeks financial discovery and other information about products that it chose
 4 to omit from its final infringement contentions. AIT had every opportunity to accuse these
 5 products with detailed infringement contentions prior to the Patent Local Rule 1-18a deadline, but
 6 elected not to. Despite having full technical discovery into the operation of Marketing Cloud, AIT
 7 failed to chart it. AIT also seeks to add a product, B2B Commerce, that it has not mentioned in
 8 any discovery or in its contentions. And AIT seeks unbounded discovery into unspecified other
 9 products without naming them or justifying its expansive requests. It is too late for AIT to expand
 10 the scope of accused products, particularly without seeking to amend its infringement contentions,
 11 as AIT itself argued to the Court in its recent motion to strike. *E.g.*, Dkt. 185 at 1 (“[T]he Court’s
 12 Local Rules of Practice for Patent Cases . . . prohibit amendments to a party’s disclosures absent a
 13 showing of good cause.”)

14 Second, AIT seeks foreign sales data, even though it is black letter law that only domestic
 15 activity can infringe a United States patent and AIT has made no showing that any of Salesforce’s
 16 international sales are relevant to damages or any other issue in the case. Put simply, foreign sales
 17 are not infringing, and thus are not properly included in any damages calculation in this case.

18 Third, AIT demands financial information about the number of “seats” sold or licensed for
 19 the accused Salesforce products. Despite the marginal relevance of this discovery, Salesforce has
 20 produced it for every accused product for the entire damages period. Accordingly this request is
 21 moot.

22 Because AIT’s motion lacks merit, it should be denied and this case should proceed under
 23 the case schedule to expert discovery and then summary judgment.

24 **II. LEGAL STANDARD**

25 Federal Rule of Civil Procedure 26(b)(1) governs discovery’s scope and limits. Discovery
 26 is permitted only regarding matters that are “relevant to any party’s claim or defense and
 27 proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). Additionally, “[t]he party seeking
 28 to compel discovery has the burden of demonstrating it has satisfied the relevancy requirement.”

1 *Belavilas v. KKW Trucking, Inc./Furniture Transp. Sys., Inc.*, No. 2:07-CV-01161-LDJ-RJJ, 2008
 2 WL 11389217, at *2 (D. Nev. Sept. 26, 2008). Moreover, “[i]n general, the party seeking to
 3 compel discovery must inform the court which discovery requests are the subject of the motion to
 4 compel, and, for each disputed request, inform the court why the information sought is relevant
 5 and why the objections are not meritorious. *Sarnowski v. Peters*, No. 2:16-CV-00176-SU, 2017
 6 WL 4467542, at *1 (D. Or. Oct. 6, 2017) (citing *Weaving v. City of Hillsboro*, No. CV-10-1432-
 7 HZ, 2011 WL 1938128, at *1 (D. Or. May 20, 2011)). On a motion to compel, “the moving party
 8 bears the burden of showing good cause.” *Castro v. Poulton*, No. 2:15-CV-1908, 2017 WL
 9 3723651, at *9 (D. Nev. Aug. 29, 2017) (citing Fed. R. Civ. P. 26(b)(1)). “[L]itigants seeking to
 10 compel discovery must describe with a reasonable degree of specificity the information they hope
 11 to obtain and its importance to their case.” *Johnson v. Northwest Airlines, Inc.*, No. C 08-02272
 12 VRW, 2009 WL 839044, *2 (N.D. Cal. Mar. 30, 2009) (citing *Cervantes v. Time, Inc.*, 464 F.2d
 13 986, 994 (8th Cir. 1972)).

14 III. **AIT’S MOTION TO COMPEL SHOULD BE DENIED**

15 A. **Salesforce Should Not Be Compelled to Provide Additional Discovery on** **Marketing Cloud or B2B Commerce**

16 The deadline for final infringement contention passed on January 10, 2022—more than
 17 three months ago. At this late stage of the case, several years into the fact discovery period, the
 18 scope of accused products (and discovery) is bounded by the contentions that AIT has *charted* in
 19 its final infringement contentions. LPR 1-6(c) (requiring “*a chart identifying specifically where*
 20 *each limitation of each asserted claim is found* within each Accused Instrumentality”) (emphasis
 21 added); *see also Drone Techs., Inc. v. Parrot S.A.*, 838 F.3d 1283, 1299-300 (Fed. Cir. 2016)
 22 (Products were not properly accused in infringement contentions by a summary statement that the
 23 products “may also be Accused Instrumentalities.”); *Infineon Techs. AG v. Volterra*
 24 *Semiconductor Corp.*, No. C 11-6239 MMC (DMR), 2012 WL 6184394, at *3 (N.D. Cal. Dec. 11,
 25 2012) (Patent Local Rules generally require “specific identification of particular accused
 26 products” and do not tolerate “broad categorical identification of the use of mere representative

1 examples.”);¹ *Tesseron, Ltd. v. R.R. Donnelley & Sons Co.*, No. 1:06 CV 2909, 2007 WL 2034286,
 2 at *3 (N.D. Ohio. July 10, 2007) (Discovery into products requires the requesting party to
 3 “identify with specificity the component, characteristic, or element of the product or system that
 4 the claimants believe will render the product or system infringing.”).

5 AIT’s gambit to obtain discovery about Salesforce products it elected not to chart in its
 6 final infringement contentions would thwart the entire purpose of the Patent Local Rules’
 7 deadlines for infringement contentions. *See Linksmart Wireless Tech., LLC v. Golden Nugget,*
 8 *Inc.*, No. 2:18-cv-00862-MMD-NJK, 2021 WL 1150065, at *3 (D. Nev. Mar. 25, 2021) (The
 9 “purpose of requiring parties to disclose the basis for their contentions is to make them explicit
 10 and streamline patent litigation.”). And, as explained further below, that is exactly what AIT is
 11 trying to do with respect to Salesforce’s Marketing Cloud and B2B Commerce products.²

12 **1. AIT Failed to Provide Particularized Infringement Allegations Against**
Marketing Cloud in Its Final Contentions

13 AIT elected not to provide element-by-element contentions against Marketing Cloud in its
 14 initial and final infringement contentions. Rather, AIT’s contentions are based on the purported
 15 operation of “the Force.com platform and Salesforce1 platform.” *E.g.*, Stake Ex.³ A (’482 patent
 16 claim chart) at 1 (“[REDACTED]
 17 [REDACTED]
 18 [REDACTED]”); Stake Ex. B (’111 patent claim chart) (“[REDACTED]
 19 [REDACTED]

21 ¹ *See also Linksmart Wireless Tech., LLC v. Golden Nugget, Inc.*, No. 2:18-cv-00862-MMD-
 22 NJK, 2021 WL 1150065, at *3 n.6 (D. Nev. Mar. 25, 2021) (“Courts in this District often rely on
 23 decisions interpreting the local patent rules of the Northern District of California when interpreting
 24 the Local Patent Rules”).

25 ² To the extent AIT legitimately seeks discovery on these products, it would need to first seek
 26 leave to amend its final infringement contentions. *E.g.*, *Icon-IP Pty Ltd. v. Specialized Bicycle*
Components, Inc., No. 12-cv-03844-JST (MEJ), 2014 WL 4593338, at *2-4 (N.D. Cal. Sept. 15,
 27 2014) (denying patentee’s motion to compel accused infringer to produce discovery on unaccused
 28 models of its products and requiring patentee to amend its infringement contentions).

29 ³ Here and throughout the Opposition, “Stake Decl.” and “Stake Ex.” refer to the declaration
 30 and exhibits attached to the Declaration of Sam Stake In Support Of Salesforce’s Opposition To
 31 AIT’s Motion To Compel, filed concurrently herewith.

1 [REDACTED] AIT also states that “[REDACTED]
 2 [REDACTED]
 3 [REDACTED]”). Stake Ex. B ('111 patent claim chart) at 2; *see also* Stake Ex.
 4 B ('482 patent claim chart) at 23 (similar). Moreover, for claim limitations concerning “layers”
 5 and “portions” required by all asserted claims, AIT’s infringement allegations are specifically
 6 directed to [REDACTED]
 7 [REDACTED] Stake Ex. A ('482 patent claim chart) at 29-33, 37, 95-99, 104; Stake Ex. B ('111
 8 patent claim chart) at 13-17, 24, 40. And for claim limitations about “automatic detect[ing]” using
 9 “intelligent agents” (also required by all asserted independent claims), AIT’s infringement
 10 allegations are limited to [REDACTED]
 11 [REDACTED] in these alleged platforms. Stake Ex. A ('482 patent claim chart) at 58-63, 125-
 12 30; Stake Ex. B ('111 patent claim chart) at 58-63. Thus, AIT’s infringement allegations against
 13 Marketing Cloud in its final infringement contentions charts are explicitly tied, not to any
 14 particular functionality in Marketing Cloud, but to alleged features of the “the Force.com platform
 15 and Salesforce1 platform.”

16 These contentions are insufficient—and simply incorrect—because, as Salesforce has
 17 repeatedly explained to AIT, Marketing Cloud ***is not built on the “the Force.com platform and***
Salesforce1 platform. Declaration of Tod Karpinski filed concurrently (“Karpinski Decl.”) ¶¶ 7,
 18 13. To the contrary, as Salesforce has repeatedly told AIT, Marketing Cloud is a separate
 19 collection of products, all of which originated outside of Salesforce and were obtained via
 20 acquisitions of other companies. Karpinski Decl. ¶¶ 8-12; Ex.⁴ 17 (Judah 3/24/2022 email) at 1

22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]. This point was also confirmed at the deposition of Ian Varley,
 25 Principal Architect at Salesforce. Stake Ex. C (Varley Dep. Tr.) at 50:21-51:2; 52:7-53:5. Thus,
 26 AIT’s infringement allegations against “the Force.com platform and Salesforce1 platform” ***are***

27 ⁴ Here and throughout the Opposition, “Ex.” refer to exhibits attached to the Declaration of
 28 Andrea Pacelli In Support of AIT’s Motion, at Dkt. 190.

1 ***inapplicable to Marketing Cloud.*** As one particular example, [REDACTED]
 2 [REDACTED] Stake Ex. C (Varley Dep. Tr.) at 55:11-56:7 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]; Karpinski Decl. ¶ 14. Because AIT’s infringement
 5 claim charts identify only UDD as meeting particular “layer” and “portion” claim limitations, the
 6 charts do not present a *prima facie* case of infringement by Marketing Cloud. Similarly,
 7 Marketing Cloud does not use the “Metadata API.” Karpinski Decl. ¶ 15. Because it does not
 8 employ these features, Marketing Cloud is not accused of infringement under any theory charted
 9 in AIT’s final infringement contentions.⁵

10 Indeed, AIT does not dispute that it failed to provide the required claim-by-claim analysis
 11 of Marketing Cloud in any of its infringement contentions. Nor does AIT dispute that Salesforce
 12 has produced thousands of documents—including technical architecture documents and source
 13 code—regarding Marketing Cloud. *See, e.g.*, Mot. at 8 (“Salesforce even made available for
 14 inspection source code for Marketing Cloud”); *see also* Stake Decl. ¶ 9. There is therefore no
 15 excuse for AIT’s failure to chart Marketing Cloud in its final infringement contentions, and no
 16 basis to compel financial or other discovery regarding a product that AIT deliberately omitted
 17 from its contentions. *See, e.g.*, *Sensor Elec. Tech., Inc. v. Bolb, Inc.*, No. 18-cv-05194-LHK
 18 (VKD), 2019 WL 570758, at *2 (N.D. Cal. Feb. 12, 2019) (Plaintiff “may only obtain discovery
 19 that is relevant to a claim or defense” and therefore discovery into unaccused products “cannot be
 20 directly relevant to [plaintiff’s] infringement claims or responsive to its contentions.”) (quotation
 21 omitted); *MediaTek, Inc. v. Freescale Semiconductor, Inc.*, No. 11-5341 YGR (JSC), 2013 WL
 22 588760, at *2 (N.D. Cal. Feb. 13, 2013) (“Since the additional products on which MediaTek seeks
 23 discovery have not been accused in this case, MediaTek is not entitled to discovery as to those
 24 products . . .”).

25 ⁵ There are other significant differences between Marketing Cloud and the accused
 26 “Force.com platform and Salesforce1 platform,” including that Marketing Cloud employs a
 27 separate data model from the accused platforms. Karpinski Decl. ¶ 13; Stake Ex. C (Varley Dep
 Tr.) at 61:13-62:20. [REDACTED] Stake Ex. C (Varley Dep Tr.) at 198:7-199:9.
 28 [REDACTED]

1 AIT’s reliance on *Apple v. Samsung* is misplaced. There, Apple waived its relevance and
 2 burden objections because it “offer[ed] no justification for introducing additional objection
 3 arguments at a later time.” *Apple Inc. v. Samsung Elecs. Co.*, No. C 11-CV-1846 LHK (PSG),
 4 2012 WL 952254, at *2 (N.D. Cal. Mar. 20, 2012). This is not the case here, because Salesforce
 5 has ample justification, as detailed above, including because of AIT’s recent submission of final
 6 infringement contentions. Further, unlike Apple, Salesforce has consistently made and maintained
 7 relevance and overbreadth objections with respect to unaccused products. *See, e.g.*, Ex. 3
 8 (Salesforce’s Objections and Responses to AIT’s First Set of Requests for Production) at 6
 9 (objecting to the definition of “Accused Products” on grounds of relevance and overbreadth) and
 10 34-35 (objecting to RFP No. 39 on grounds of relevance and overbreadth); see also Ex. 22
 11 (Salesforce’s Amended Contentions) at 4 (objecting that “AIT should be limited to the theories set
 12 forth in its contentions. The Accused Instrumentalities or Products should also be limited to only
 13 those identified in the infringement charts in Exhibits A and B to . . . AIT’s Infringement
 14 Contentions. Although AIT alleged other Salesforce and third-party applications in Exhibits A
 15 and B to Infringement Contentions as alleged ‘embodiments’ of infringing instrumentalities, it
 16 failed to provide any infringement charts or other evidence explaining how these applications
 17 infringe the Patents-in-Suit.”). Salesforce also notified AIT promptly after AIT served its final
 18 infringement contentions its objection that AIT’s contentions did not properly accuse Marketing
 19 Cloud. Ex. 18 (2/23/2022 Stake Email) at 1 (“AIT’s amended contentions are also deficient in
 20 other critical respects. For example, AIT purports to assert infringement by Marketing
 21 Cloud/ExactTarget Marketing Cloud, and yet it has not charted or otherwise provided contentions
 22 sufficient to put Salesforce on notice of its infringement theories for these products.”).

23 Therefore, AIT’s motion should be denied as to Marketing Cloud because it is not charted
 24 in AIT’s final infringement contentions (despite ample opportunity for AIT to have done so) and is
 25 hence not relevant to a claim or defense.
 26
 27
 28

1 **2. AIT’s Requested Discovery About B2B Commerce Is Improper in**
 2 **Light of AIT’s Operative Infringement Contentions and Discovery**
 3 **Requests**

4 AIT’s request for discovery concerning B2B Commerce should be denied because AIT (i)
 5 did not identify B2B Commerce as an accused product in its infringement contentions; (ii) has
 6 failed to even seek leave to supplement its contentions to identify B2B Commerce as an accused
 7 product; and (iii) even failed to propound any written discovery targeting B2B Commerce. B2B
 8 Commerce is therefore an unaccused product that is not at issue in this case. AIT was required—
 9 but failed—to add it to its infringement contentions and propound additional written discovery
 10 directed to it, at which point Salesforce would have the opportunity to provide formal objections
 11 and responses. Only then would it be appropriate for the Court to even consider a motion to
 12 compel concerning B2B Commerce.

13 First, and fatal to its motion to compel, AIT failed to include any mention of B2B
 14 Commerce in any of its infringement contentions. Ex. 4 at 1 (AIT’s description of accused
 15 instrumentalities in its initial infringement contentions); Stake Ex. D at 1-2 (AIT’s description of
 16 accused instrumentalities in its final infringement contentions). AIT’s claim to the contrary, *i.e.*,
 17 that “[t]here is no need for AIT to amend its infringement contentions, because B2B Commerce is
 18 already included within the scope of the Accused Products” (Mot. at 9 n.5), is without merit.
 19 Indeed, AIT selectively misquotes its infringement contentions. Rather than accusing all
 20 “Salesforce.com products that depend on these platforms,” as alleged in its brief, AIT’s
 21 contentions state: “Salesforce.com products that depend on these platforms and are embodiments
 22 of infringing systems and methods are Sales Cloud, Service Cloud, Marketing Cloud, and
 23 ExactTarget Marketing Cloud.” Ex. 4 at 1. Moreover, even assuming that AIT had actually
 24 accused all “Salesforce.com products that depend on these platforms,” that would have been
 25 impermissibly overbroad and insufficient to accuse B2B Commerce. *E.g., Hologram USA, Inc. v.*
Pulse Evolution Corp., No. 2:14-cv-00772-GMN-NJK, 2016 WL 3353935, at *3 (D. Nev. June
 26 10, 2016) (Motion to compel discovery regarding “any and all holographic systems produced,
 27 marketed, sold or offered for sale” by defendant was denied as overbroad).

1 Moreover, AIT’s articulated reason for discovery about B2B Commerce at this late date—
 2 at the close of fact discovery, and months after final infringement contentions were served—is that
 3 AIT only learned about a purported shared code base from a recent deposition. Mot. at 9.⁶ As a
 4 preliminary matter, AIT elected not to conduct *any* deposition of *any* Salesforce witness until well
 5 after final infringement contentions. Moreover, the Local Patent Rules explicitly contemplate
 6 such a scenario. They provide AIT the opportunity to seek leave to amend its infringement
 7 contentions on a showing of “good cause” based on “recent discovery of nonpublic information” if
 8 AIT conducted an “earlier diligent search.”⁷ LPR 1-12 (“Other than as provided in LPR 1-18a no
 9 other amendments to disclosures may be made other than as set forth herein absent a showing of
 10 good cause. Non-exhaustive examples of circumstance that may, absent undue prejudice to the
 11 nonmoving party, support a finding of good cause include: . . . (c) recent discovery of nonpublic
 12 information about the Accused Instrumentality despite earlier diligent search.”). If AIT were
 13 correct that newly-discovered information from a deposition uncovered a new, infringing product
 14 that it could not have uncovered through an earlier diligent search, then AIT should have moved
 15 for leave to amend its infringement contentions. But it has not done so, and cannot short-circuit
 16 that process via this motion.

17 Next, AIT has not propounded any discovery requests to Salesforce asking for information
 18 about B2B Commerce. For example, B2B Commerce does not fall within the definition of
 19 “Accused Products” provided by AIT in its First Set of Requests for Production, nor does AIT
 20 even contend that it does. Ex. 2 at 5; *see also* Mot. at 2, 6. And tellingly, AIT’s motion fails to
 21 link B2B Commerce to any particular discovery request that it propounded. Thus, there is no
 22 operative discovery request to which Salesforce could be compelled to respond to or produce

23 ⁶ AIT appears to contend that counsel for Salesforce misled it about technical commonalities
 24 between B2B Commerce and other accused products in this case. Mot. at 6. Not so. Commerce
 25 Cloud, including B2B Commerce, is a distinct product from Sales Cloud and Service Cloud. Ex.
 26 21 at 1. Mr. Varley’s testimony that [REDACTED] Ex. 19 at 58:23-24, is consistent, and does not imply that infringement allegations against Sales Cloud or
 Service Cloud could be applicable wholesale to B2B Commerce.

27 ⁷ Given that AIT failed to propound discovery requests directed to B2B Commerce or
 otherwise pursue any discovery related to it—indeed, failing to take a single deposition until after
 its final infringement contentions were due—AIT is unable to meet this diligence standard.

1 documents for. Motions to compel under Rule 37 are specifically limited to failures to respond to
 2 discovery obligations or requests under Rules 26, 30, 31, 33, or 34. Fed. R. Civ. P. 37(a)(3). AIT
 3 has not identified any specific Rule 26, 30, 31, 33, or 34 discovery request or obligation in this
 4 case that relates to B2B Commerce, and there are none. Thus, a Rule 37 motion to compel is an
 5 improper procedural mechanism given the posture of this case.

6 **3. AIT’s Requested Relief Should Be Denied Because It Goes Far Beyond**
 Marketing Cloud or B2B Commerce

7 AIT’s motion should also be denied as to any requested relief that goes beyond the specific
 8 Marketing Cloud and B2B Commerce products that AIT addresses in its brief. Rather than
 9 seeking discovery about those products during the fact discovery period, AIT instead requests an
 10 effectively unbounded and undefined “order from this Court compelling Salesforce to provide
 11 discovery concerning the full scope of products that AIT accuses of infringement, and to which
 12 Salesforce has not timely objected, namely: (i) the Salesforce platform; (ii) end-user applications
 13 based on the Salesforce platform, including B2B Commerce; and (iii) any products specifically
 14 identified by AIT, including Sales Cloud, Service Cloud, and Marketing Cloud.” Mot. at 9; *see*
 15 *also id.* at 1 (“AIT seeks the Court’s intervention to compel Salesforce to provide discovery with
 16 respect to ***all*** products at issue in this action and for ***all*** relevant information requested by AIT.”)
 17 (emphasis original). This request is improper for several reasons.
 18

19 First, AIT’s requested relief seeks to undercut the very purpose of the service of
 20 infringement contentions as required by the Local Patent Rules. *See Linksmart Wireless Tech.,*
LLC v. Golden Nugget, Inc., No. 2:18-cv-00862-MMD-NJK, 2021 WL 1150065, at *3 (D. Nev.
 21 Mar. 21, 2021) (The “purpose of requiring parties to disclose the basis for their contentions is to
 22 make them explicit and streamline patent litigation.”). AIT is not entitled to discovery about
 23 unspecified products that were not appropriately disclosed in its infringement contentions. AIT’s
 24 motion attempts an end-run around the Local Patent Rules and seeks to retroactively add new
 25 products to this case.

26 Second, AIT has not provided ***any*** justification in its papers for its expanded requested
 27 relief. The only particular products that AIT discusses in its motion are Marketing Cloud and B2B
 28

1 Commerce. AIT has failed to even attempt to provide a rationale for any discovery beyond those
 2 specific products, or to identify any deficiencies in connection with Salesforce's discovery
 3 responses and productions relating to the "Salesforce platform," "Sales cloud," or "Service
 4 Cloud." If AIT wants discovery on some other, unspecified products, it is incumbent on AIT to
 5 tell the Court ***what those products are*** and ***why the discovery is justified***, rather than attempting to
 6 sneak in additional, unwarranted compelled discovery through this motion. It would be highly
 7 prejudicial for Salesforce to be compelled to produce material for some other undefined scope of
 8 products, when Salesforce has not been apprised what those products even are, and has not had an
 9 opportunity to present a contrary case to the Court.

10 Third, AIT's requested relief is, on its face, overbroad, unduly burdensome, and not
 11 appropriately tailored as to the information requested. Courts routinely deny motions to compel
 12 that fail to identify the information sought with specificity. *Freescale Semiconductor, Inc. v.*
 13 *Promos Techs.*, No. 4:06cv491, 2007 WL 4368057, at * 1 (E.D. Tex. Dec. 13, 2007) (denying
 14 patentee's motion to compel discovery from accused infringer in part because the motion to
 15 compel was overbroad—"Freescale contends that circuit schematics and data sheets have not been
 16 produced for 'HUNDREDS OF ACCUSED INSTRUMENTALITIES.' . . . This is nothing more
 17 than patent hyperbole and the Court won't consider such a broad and illusive request, i.e. be
 18 specific or be silent."); *see also Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 2:14-cv-00772-
 19 GMN-NJK, 2016 WL 3353935, at *3 (D. Nev. June 10, 2016) (patent plaintiff's motion to compel
 20 discovery regarding "any and all holographic systems produced, marketed, sold or offered for
 21 sale" by defendant was denied as overly broad). Here, in addition to not specifying what other
 22 ***products*** it believes are the subject of this discovery dispute (besides Marketing Cloud and B2B
 23 Commerce), AIT also demands relief for a set of ***unspecified discovery requests***. Mot. at 2 n.2
 24 ("The relief requested by AIT is relevant to other discovery requests to the extent the Court
 25 compels Salesforce to produce responsive documents and information relating to additional
 26 products. RFP No. 39 is sufficient to exemplify the issues in dispute for purposes of this
 27 Motion."). This is, of course, improper—Salesforce cannot effectively respond if AIT fails to
 28 identify the additional discovery requests that are purportedly at issue.

1 Fourth, AIT’s requested relief is impermissibly vague and ambiguous. A party “is not
 2 required to puzzle out what [another party] intended to say” in its discovery request. *Sattari v. Citi*
 3 *Mort.*, No. 2:09-cv-00769-RLH-GWF, 2010 WL 4782133, at *2 (D. Nev. Nov. 17, 2010); *see also*
 4 *Blumhorst v. Pierce Mfg., Inc.*, No. 4:10-cv-00573-REB, 2014 WL 12593989, at *1 (D. Id. Oct. 6,
 5 2014) (A party “has no duty to guess at what [another party] is seeking to know (or obtain).”).
 6 Here, AIT’s requested relief is a mixture of undefined terms susceptible to multiple interpretations
 7 and, in effect, amounts to expansive discovery into all products ever released by Salesforce or by
 8 third parties using Salesforce’s platforms. This is inappropriate, and is the precise scenario that the
 9 Local Patent Rules and submission of final infringement contentions are intended to prevent.

10 Thus, AIT’s motion should be denied because the scope of its requested relief is not
 11 commensurate with the issues that AIT raises.

12 **B. AIT Fails to Show Discovery Into Foreign Sales Data Is Relevant or**
 13 **Proportional to the Needs of the Case**

14 AIT demands that the Court order Salesforce to produce its “financial information without
 15 regard to the geographic source of the relevant revenue”—by which it means foreign sales data,
 16 since there is no dispute that Salesforce has already produced its sales data for the US. Mot. at 9-
 17 10. AIT offers only two flawed bases for seeking data on Salesforce’s foreign sales data. First,
 18 AIT claims that foreign sales data is relevant to damages—specifically, to a reasonable royalty
 19 analysis. Mot. at 10-11. But foreign sales are only relevant to damages insofar as AIT can make
 20 its required threshold showing that those foreign sales are derived from US-based acts of
 21 infringement. Even at this late stage of the proceedings, AIT has not and cannot make that
 22 showing, but offers only speculation that because Salesforce is headquartered in the US, it must be
 23 engaging in infringing activity in the US. That is not sufficient. Second, AIT claims that foreign
 24 sales data is relevant to non-obviousness as evidence of commercial success. Mot. at 10. But the
 25 success of Salesforce’s products is not in dispute, and Salesforce has already produced ample
 26 evidence of this success through its US-based revenue.

27
28

1 **1. Foreign Sales Data Is Not Relevant to Damages Because AIT Fails to**
 2 **Identify any United States-Based Infringing Activity**

3 AIT’s assertion that Salesforce’s foreign sales data is “highly relevant” to a reasonable
 4 royalty is simply not true. “The royalty base for reasonable royalty damages cannot include
 5 activities that do not constitute patent infringement, as patent damages are limited to those
 6 ‘adequate to compensate for the infringement.’” *AstraZeneca AB v. Apotex Corp.*, 782 F.3d 1324,
 7 1343 (Fed. Cir. 2015) (quoting 35 U.S.C. § 284). Under 35 U.S.C. §§ 271(a)-(b), “no
 8 infringement occurs when a patented product is made and sold in another country.” *Microsoft*
 9 *Corp. v. AT & T Corp.*, 550 U.S. 437, 441 (2007); *see also Power Integrations, Inc. v. Fairchild*
 10 *Semiconductor Int’l, Inc.*, 711 F.3d 1348, 1371 (Fed. Cir. 2013) (“a defendant’s foreign
 11 exploitation of a patented invention . . . is not infringement at all.”). Moreover, “[e]ven indirect
 12 infringement, which can encompass conduct occurring elsewhere, . . . requires underlying direct
 13 infringement in the United States[.]” *See id.* “Patent infringement damages, therefore, must
 14 compensate only for the consequences of domestic activities.” *Oracle Am., Inc. v. Google, Inc.*,
 15 798 F. Supp. 2d 1111, 1118 (N.D. Cal. 2011). If the alleged exploitation of the patented invention
 16 occurred overseas, the “information regarding defendant’s foreign sales is not relevant to the
 17 hypothetical negotiation of the reasonable royalty amount because defendant would not be liable
 18 for foreign sales that do not violate U.S. patent laws.” *Kajeet, Inc. v. Qustodio, LLC*, No. SA CV
 19 18-1519-JAK (PLAx), 2019 WL 8060078, at *13 (C.D. Cal. Oct. 22, 2019); *see also Finjan, Inc.*
 20 *v. Qualys Inc.*, No. 18-cv-07229-YGR (TSH), 2020 WL 5569704, at *1 (N.D. Cal. Sept. 17,
 21 2020); *FlowRider Surf, Ltd. v. Pac. Surf Designs, Inc.*, No. 15-cv-1879-BEN (BLM), 2016 WL
 22 6522808, at *7 (S.D. Cal. Nov. 3, 2016).

23 AIT concedes, as it must, that to obtain foreign sales data, it is required to make a
 24 threshold showing that Salesforce’s foreign sales “occur in the United States.” Mot. at 10. To
 25 make this determination, courts look to where the “substantial activities of a sales transaction,”
 26 including the “formation of a contract for sale” and the “delivery and performance under the sales
 27 contract.” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 831 F.3d 1369, 1378 (Fed. Cir. 2016). Where
 28 these substantial activities occur outside the United States, as here, “pricing and contracting

1 negotiations in the United States alone do not constitute or transform those extraterritorial
 2 activities into a sale within the United States for purposes of § 271(a).” *Id.*; *see also Ziptronix,*
 3 *Inc. v. OmniVision Techs., Inc.*, 71 F. Supp. 3d 1090, 1096 (N.D. Cal. 2014) (“[E]ven accepting
 4 Ziptronix’s position that the acts of TSMC NA and TSMC Ltd. can be considered together in
 5 determining direct infringement liability, and that the TSMC entities and OmniVision executed
 6 valid contracts in the United States for the ‘sale’ of the accused wafers, neither TSMC Ltd. nor
 7 TSMC NA is liable for direct infringement because the accused wafers were not sold ‘within the
 8 United States.’”). The Supreme Court has explicitly held that the foreign sale of software
 9 developed in the United States does not constitute infringement because the software is not “made
 10 or sold” in the United States, and is not even a component “supplied” from the United States.
 11 *Microsoft*, 550 U.S. at 441.

12 AIT does not come close to making its threshold showing that Salesforce’s foreign sales
 13 occur in the United States. AIT does not claim that any contracts for the foreign sales of the
 14 Accused Products were formed or performed in the United States. AIT does not even allege that
 15 any pricing and contract negotiations took place in the United States. AIT argues only that
 16 Salesforce’s headquarters and “many” of its employees are located in the United States. Mot. at
 17 11. That does not establish or even suggest that foreign sales are relevant to any United States-
 18 based infringement activity. *See Halo*, 831 F.3d at 1378; *Ziptronix*, 71 F. Supp. 3d at 1096.

19 AIT relies on three cases where foreign sales data was produced, but all three of those
 20 cases involved physical products that were made in the United States or imported into the United
 21 States. *See Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. CV 16-00300 CJC (RAOx), 2017
 22 WL 3275615, at *1, 4 (C.D. Cal. Feb. 14, 2017) (accused products were incorporated into third
 23 party products and imported into the United States); Brief of Defendant at 2, *EVS Codec Techs.,*
 24 *LLC v. OnePlus Tech. (Shenzhen) Co.*, No. 46 (E.D. Tex. Apr. 9, 2020) 2020 WL 6365514
 25 (accused products were contained in mobile devices sold in the United States); *GE Healthcare*
 26 *Bio-Sciences AB v. Bio-Rad Laboratories, Inc.*, No. 1:14-CV-07080-LTS-SN, 2015 WL 7582967,
 27 at *1 (S.D.N.Y. Nov. 25, 2015) (Accused product was a physical product “produced in the United
 28 States and subsequently sold by the manufacturer to foreign buyers.”). Those cases do not apply

here because AIT’s infringement contentions do not allege that any physical product was made in or imported into the United States. *See generally* Ex. 4 (AIT’s Disclosure of Asserted Claims and Infringement Contentions). To the contrary, as in *Microsoft*, Salesforce’s foreign sales data relates to sales of software that occurred outside the United States. Thus, Salesforce’s foreign sales data is not relevant to any infringement activity.

2. Foreign Sales Data Is Not Needed to Show That Salesforce Is Commercially Successful

8 Apparently realizing it cannot make a threshold showing that foreign sales relate to
9 infringement activity, AIT alternatively claims that it needs Salesforce’s foreign sales data to show
10 that Salesforce is commercially successful. Mot. at 10. But the fact that Salesforce is
11 commercially successful is not in dispute. Further, Salesforce has already provided “over a
12 decade’s worth of United States revenue for the accused products,” (Ex. 17 (03/24/2022 Judah
13 email) at 1-2), and SEC filings that identify its total worldwide revenue for the accused products.
14 This is more than sufficient to demonstrate Salesforce’s commercial success. Indeed, it is difficult
15 to see what additional value providing more detailed foreign sales data could provide on this issue.
16 AIT’s continued demand for foreign sales data is completely unhelpful, let alone proportional to
17 the issues in this case.⁸ *FlowRider*, 2016 WL 6522808, at *7 (denying motion to compel foreign
18 sales data and rejecting argument that the requested information was necessary to show
commercial success as a defense to obviousness).

3. Salesforce Did Not Waive Its Objections to the Production of Foreign Sales Data

21 AIT contends Salesforce waived its objections to the production of foreign sales data. It
22 did not. As explained above, Salesforce objected to the production of foreign sales data for the
23 accused products made and sold abroad because AIT's discovery requests are overbroad as to
24 geographical scope, not relevant to AIT's infringement claims, and not proportional to the needs

⁸ AIT relies on *EVS Codec Techs., LLC v. OnePlus Tech. (Shenzhen) Co.*, No. 2:19-CV-00057-JRG, 2020 WL 6365514, at *2 (E.D. Tex. Apr. 9, 2020), but that case is distinct because there was a live dispute over the commercial success of the accused products and the defendant had provided **no** information on its worldwide sales.

of this case. Ex. 3 at 4, 35. Unlike the defendant in the *Richmark* case cited by AIT, Salesforce included these objections in its discovery responses served within the time allotted under Federal Rule of Civil Procedure 34(b)(2)(B). *Id.* (objecting “to the extent the information sought is ***not reasonably limited in geographic . . . scope***” and “seeks information that is neither relevant to the claims or defenses of any party nor reasonably calculated to lead to the discovery of admissible evidence”)(emphasis added). As such, Salesforce has not waived these objections.

C. AIT's Request for Information About the Number of Seats Per License Is Moot Because Salesforce Has Produced the Requested Information

Finally, AIT requests information about the number of active “seats” for each product licensed by Salesforce. Salesforce has now produced that information for the time period 2008 to the present (i.e, the entire time period relevant to this case). *See* Stake Ex. E, F.⁹ Accordingly, AIT’s request should be denied as moot.

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Respectfully submitted,

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⁹ Salesforce produced this information in order to limit the number of disputes before the Court, despite the fact that the revenue, price, and SKU information already produced by Salesforce was more than sufficient for AIT to calculate damages based on a reasonable royalty, as demonstrated by AIT’s own cases. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1339 (Fed. Cir. 2009) (reasonable royalty based on “either sale price or number of units sold”); *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1237–41 (Fed. Cir. 2011) (reasonable royalty based on “per-unit” award).

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I am an employee of Quinn Emanuel Urquhart & Sullivan LLP and that pursuant to LR 5-3 I caused to be electronically filed on this date a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF system which will automatically e-serve the same on the attorney set forth below:

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